UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

LEGGETT & PLATT, INC.

and

Cases 09-CA-194057
09-CA-196426
09-CA-196608

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (IAM), AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION

This matter is before Administrative Law Judge Andrew S. Gollin upon the General Counsel's June 15, 2017 Second Consolidated Complaint alleging that on about March 1, 2017 Respondent: unlawfully withdrew its recognition of the union as the exclusive collective-bargaining representative of the Unit in the absence of the results of a Board election; on the same date and continuing to date, made changes to employees' terms and conditions of employment without bargaining with the Union in violation of Section 8(a)(1) and (5) of the Act; and that in about early April 2017, directed employees to meet with a fellow employee to sign a petition to decertify the Union in violation of Section 8(a)(1) of the Act. The case was heard on July 24 through July 26, 2017 in Mt. Sterling, Kentucky. As set forth in more detail herein, the record evidence convincingly supports the General Counsel's case.

II. THE FACTS

A. Background

Leggett & Platt, Inc. (Respondent) manufactures innerspring mattresses at its two facilities in Winchester, Kentucky. [1]/ (G.C. Ex. 1; Tr. 61, 200) The International Association of Machinists and Aerospace Workers (IAM), AFL-CIO, Local Lodge 619 has represented Respondent's production and maintenance employees at these facilities since 1965. (Tr. 63, Jt. Ex. 1) The most recent collective-bargaining agreement expired on February 28, 2017 (Jt. Ex. 1, Tr. 216-217)

B. Employees collect signatures on a disaffection petition and present the petition to Respondent

In about December 2016, employees Keith Purvis and Jacob Purvis began circulating a petition stating that the undersigned employees "do not want to be represented by IAM 619." (R. Ex.7, Tr. 318, 328, 379-380) (hereafter referred to as the anti-union petition) Jonathan Bryant, George McIntosh, and Ricky Marshall assisted in gathering the signatures. (Tr. 355, 366, 547) Respondent says that it received the petition from Keith Purvis on December 19, 2016. (Tr. 227) At that time, the petition contained 159 signatures. (Tr. 235, R. Ex. 7) Subsequently, in about January 2017, Keith Purvis provided Respondent with additional signatures. (Tr. 228-229, 232, R. Ex. 7) By March 1, 2017, the anti-Union petition had 182 signatures, but 15 of those employees providing signatures had left the bargaining unit. (R. Ex 7, Jt. Ex. 8). This brought the number of signatures to 167 (not accounting for the 28 employees who signed the pro-union petition subsequent to signing the anti-union petition (discussed further, supra) Additionally, another employee whose name appears on the anti-union petition, William Woodruff, never signed the anti-union petition. (Tr. 629-630)

[1]/ References to the transcript will be designated as (Tr. ___); references to General Counsel's Exhibits will be designated as (G.C. Ex. ___); references to Joint Exhibits will be designated as (Jt. Ex. ___); and references to Respondent's Exhibits will be designated as (R. Ex. ___).

C. Respondent refuses to negotiate for a successor collective-bargaining agreement and informs the Union of its intent to withdraw recognition upon the expiration of the existing collective-bargaining agreement

On December 22, 2017, the Union, by Directing Business Representative Billy Stivers, sent Respondent a letter requesting to bargain for a new collective-bargaining agreement. (Jt. Ex. 2, Tr. 217) Respondent did not respond to this bargaining request. (Tr. 138-139) Instead, on January 11, 2017, Respondent sent a letter to the Union stating that it had received evidence from a majority of unit employees that they no longer desired to be represented by the Union and that Respondent would withdraw recognition of the Union when the collective-bargaining agreement expired on February 28, 2017. (Tr. 243, Jt. Ex. 4) On January 23, 2017, Respondent distributed a letter to employees expressing the same information and announcing that, effective March 1, 2017, it would begin implementing in the bargaining unit the same basic terms and conditions of employment received by non-bargaining unit employees. (Tr. 243, Jt. Ex. 5) The announcement letter specified that Respondent had budgeted a wage increase for 2017, that paid personal time would increase from 0 to 3 days per year, that changes would be made to health insurance which included a lower deductible, that vacation would be accrued faster, that employees could enroll in a stock bonus plan, 401(k) plan, flex spending plan, and long term disability insurance plan for which they were previously ineligible, that as of 12/31/2017, employees would be only limited participants in the Union's pension plan, that the dental insurance provider would change from Delta Dental to MetLife, that the vision plan would change from Avesis Vision Insurance to VSP Insurance, that changes would be made to life insurance, and that the costs of short term disability insurance would change from $280 per week to 40% of average weekly earnings. (Jt. Ex. 5)

The Union responded to Respondent's January 11, 2017 letter on February 21, 2017. (Tr. 248, Jt. Ex. 6) It stated that it did not believe Respondent's claim that the Union had lost

majority support. (Jt. Ex. 6) The Union also requested that Respondent negotiate a successor collective-bargaining agreement. (Jt. Ex. 6) Respondent refused the Union's request and instead reiterated, in a February 22, 2017 letter, that it intended to withdraw recognition upon expiration of the collective-bargaining agreement. (Tr. 249, Jt. Ex. 7) Respondent did not provide the Union with the anti-union petition it received. (Tr. 268)

D. <u>The Union Responds with a Counter-Petition</u>

After the Union received Respondent's January 11, 2017 letter, it started collecting signatures on a counter-petition in support of the Union (hereafter referred to as the pro-union petition). (Tr. 64, 110, 633; G.C. Ex. 2) All pages of the petition stated on top, "We the undersigned members of the International Association of Machinists and Aerospace Workers, Local Lodge 619, support the Union at Leggett & Platt, Inc." (Tr. 71, 112-114, 618, 634, 644, G.C. Ex. 2) The statement at the top of each page was on the page before any employees signed the document. (Tr. 71-72, 634, 657) The blank documents with the header were prepared in advance by Billy Stivers. (Tr. 656) The Union gathered signatures for the pro-union petition on January 18, 2017, January 21, 2017, February 8, 2017, February 27, 2017, and February 28, 2017. (G.C. Ex. 2, Tr. 69-71, 113) The signatures gathered on January 18, 2017 were gathered at the Union Hall. (Tr. 101, 405, 425, 453, 553) The meeting was announced by a flyer posted at Respondent's facility and by word of mouth. (Tr. 101, 557, 647; G.C. Ex. 7) Union President Elmer Tolson was present at the Union Hall from 5:00 am to 7:00 pm, and witnessed the signing of pages 1 through 4 of the pro-union petition on January 18, 2017. (Tr. 69-70, 107; G.C. Ex. 2). While sitting at his desk, employees approached Tolson to sign the petition, and he gave them information about what decertification could mean and a comparison of Respondent's plan for non-bargaining unit employees and the plan the Union had previously negotiated. (Tr. 102, 610, 648-649, G.C. Ex. 6) Tolson's desk was to the right as you entered

the room. (Tr. 640-641) No formal presentation was made to employees. (Tr. 102-103, 557, 655) Not all employees who came to the Union signed the pro-union petition. (Tr. 665) After Tolson left, he was replaced by Union Chief Committeeman Marvin Berry and other union representatives. (Tr. 104-105) Berry was at the Union Hall from 3:00 pm to midnight. (Tr. 111) He witnessed some of the signatures on page 2 of the pro-union petition, some of the signatures on page 3 of the petition, and the remaining signatures gathered on page 4 of the pro-union petition. (Tr. 110-112)

On January 18, 2017, the Union also collected signatures in connection with a strike authorization vote. (Tr. 635, 645, 671-672, G.C. Ex. 3) The strike authorization signature page was on a separate table to the left, next to a ballot box. (Tr. 635, 638-639, 641, 645, 650) It did not contain a header. (G.C. Ex. 3) Tolson did not tell anyone that the pro-union petition was something they had to sign in connection with the strike sanction vote. (Tr. 652)

Tolson also witnessed additional employees sign the pro-union petition on January 21, 2017 and February 8, 2017. (Tr. 70, 107) On February 27, 2017, he witnessed several additional signatures for the petition (Tr. 70-71, 107)

Marvin Berry gathered additional signatures for the pro-union petition on the night of February 27, 2017 to February 28, 2017. (Tr. 113) He gathered those signatures outside of the Leggett & Platt building on New Street. (Tr. 113) Berry told employees the petition was to support the Union. (Tr. 513, 525) By February 28, 2017, the pro-union petition included signatures of 28 employees who had previously signed the anti-union petition. (Tr.675-676). [2]/

[2]/ The 28 crossover employees are: (1) Michael Bowman, (2) Shane Caves, (3) Terris Cesefske, (4) Dustin Day, (5) Glenn Dixon, (6) Reuben Elkins, (7) Tina Freeman, (8) Justin Gilven, (9) James Green, (10) Fred Gross, (11) Paul Haddix, (12) Albert Hawkins, (13) Timothy Keeton, (14) Jack Keith, (15) Christian McIntosh, (16) Brian Patrick, (17) Christopher Payne, (18) Jose Pesina, (19) Leopold Pesina, (20) Charles Randall, (21) Tommy Roberts, (22) Ashley Rogers, (23) Marvin Rogers II, (24) Frederick Sandefur, (25) Paul Troy, (26) Tyler Troy, (27) James Wells, and (28) James Wren. (Tr. 675-676, G.C. Ex. 2, R. Ex. 7)

E. Respondent Withdraws Recognition on March 1, 2017

Respondent withdrew recognition of the Union as the collective-bargaining representative of its employees on March 1, 2017. (Jt. Ex. 9; Tr. 73, 253-254) As of March 1, 2017, the bargaining unit consisted of 295 employees. (Jt. Ex. 8; Tr. 251-252) As of that date, 182 people had signed the anti-union petition. (R. Ex. 7) However, 15 employees who signed the petition had left the bargaining unit by March 1, 2017, reducing the number of signatures to 167. (Jt. Ex. 8; R. Ex.7) In addition, Respondent did not count employee Fred Gross because it could not verify his signature. (Tr. 275, 285) Jacob Purvis testified that Fred Gross had actually asked for his name to be removed from the petition. (Tr. 324, 341) Hence, Purvis wrote a "no" next to Fred Gross's name. (Tr. 324; R. Ex. 7) Gross's name does not appear anywhere else in the anti-union petition. (R. Ex. 7) Gross also later signed the pro-union petition. (G.C. Ex. 2; Tr. 675) Respondent maintains that it verified Donnie Butler's name when he came to the office and personally signed the anti-union petition after the petition was submitted to Respondent. (Tr. 278) However, Jacob Purvis, who collected Butler's signature, claims the signature was added before the anti-union petition was given to Respondent. (Tr. 375-376) Division Sales Manager Kurt Bruckner, who verified the page of signatures that includes Donnie Butler's name, did not verify Butler's signature. (Tr. 303)

As noted above, 28 bargaining unit members who had signed the anti-Union petition later signed the pro-union petition. (Tr. 675-676; G.C. Ex. 2; R. Ex. 7) Another employee whose signature appears on the anti-union petition, William Woodruff; denies ever signing that petition. (Tr. 629-630) Thus, at the time of withdrawal, the anti-union petition contained only 137 valid signatures, representing less than 148 or 50% of the bargaining unit. [3]/

[3]/ This was calculated as follows: 182 signatures - 15 who left the unit - Donnie Butler - 28 crossover signers (including Fred Gross) - William Woodruff = 137

F. After withdrawing recognition of the Union, Respondent makes numerous changes to employees' terms and conditions of employment

Immediately after Respondent withdrew recognition of the Union on March 1, 2017, it made numerous changes to employees' terms and conditions of employment. It increased wages by three percent, changed the days off benefit to provide three paid days rather than five unpaid days off, changed the health insurance provider and network from Baptist Health to BlueCross BlueShield, changed health insurance coverage, including the deductible, changed the calculation of vacation accrual so vacation was accrued faster, provided employees with a new stock bonus plan, a new 401(k) plan, and a new health flexible spending plan, changed the dental insurance provider from Delta Dental to Metlife, changed the vision insurance provider from VSP to Avesis Vision, changed basic life insurance coverage from a flat amount of $28,500 to one times annual earnings up to $50,000, changed the available supplemental life insurance from $10,000 up to five times the basic life insurance benefit, and changed available dependent life insurance from $10,000 to $50,000 for a spouse and from $5,000 to $15,000 for children. (Jt. Ex. 10; Tr. 156, 166, 259, 364) Respondent also changed the short term disability to 40% of average weekly earnings from a flat rate of $280 per week and provided long term disability of 60% of average weekly earnings for employees' choice of a 2 year or 5 year benefit period. (Jt. Ex. 10) On December 31, 2017, bargaining unit employees will become limited participants in the Employer's pension plan. (Jt. Ex. 10) Respondent announced the changes to employees by a March 2, 2017 letter. (R. Ex. 10; Tr. 258) Respondent admits that all of the foregoing changes amount to substantial, material, and significant changes to employees' terms and conditions of employment. (Jt. Ex. 10)

Respondent also made a change to job bidding procedures. (Tr. 73, 115-116, 134) Prior to withdrawing recognition, pursuant to Article 9 of the CBA, it was Respondent's practice to post vacant jobs up on its bulletin boards for 48 hours (longer if posted on Fridays) to bid the job.

(Tr. 73-75, 115, 134, 166-168) The job bid information posted on the bulletins boards includes the date the job bid was posted, what job or classification is available, the number of openings, the department, shift, base rate, and who the job was vacated by, if Human Resources Manager Stephen Day is aware of the information. (Tr. 175-176; R. Ex. 3; R. Ex. 4) To bid for the job, employees then fill out a bid card and drop it in a bid box. (Tr. 76, 115, 169-170) If a current employee accepts a bid for a new bargaining unit job, Respondent should then bid the successful bidding employee's former position as well. (Tr. 171, 18-181)

Since March 1, 2017, Respondent has posted some, but not all, jobs up for bid. (Tr. 78-79; 134; R. Ex. 4) In about June 2017, employee Ashley Rogers was transferred from her job as a clipper in the AT department on third shift to an assembly operator position in the AR department on third shift. (Tr. 79-80). Respondent did not post the assembly operator position. (Tr. 80; R. Ex. 4) Although Respondent claims that the assembly operator position was posted, it did not produce any bid card from Rogers. (Tr. 272)

Sometime after March 1, 2017, George McIntosh, was moved from his job as a coiler specialist in the AR department on third shift to perform electrical work, including diagnosing equipment and electrical issues, after the prior maintenance engineer, Robert Ward, left to work as a branch accountant and the work remained undone. (Tr. 83, 119-120, 219-221, 269-270) Ward was not part of the bargaining unit as a maintenance engineer. (Tr. 221) The job McIntosh got was not put up for bid. (Tr. 83-84, 121; R. Ex. 4) Although Respondent claims this transfer is temporary, Ward told General Manager Charles Denisio that he suffers from MS and it hurts him to be doing his previous job on the floor, and he asked to be kept in mind for an opening in the office. (Tr. 220) He had also just completed his accounting degree. (Tr. 220) In any case, Respondent has posted temporary bids when employees have left their positions due to health reasons in the past. (Tr. 183)

Around the same time, in about March 2017, another employee, Jacob Purvis (one of the leaders of the anti-union petition drive), was moved from his job as a preventative maintenance technician in the AR department to coiler specialist position in the AR department on third shift, the job previously held by McIntosh. (Tr. 80-82, 86-87, 221, 329) This job was not posted on the bulletin board. (Tr. 82-83; 239, R. Ex. 4) Jacob Purvis agrees that he was supposed to have bid on the job because when they terminated his former position, he was supposed to be able to bump somewhere. (Tr. 330)

Several new employees were also hired without the jobs first being posted. (Tr. 87) Robert Woodward was hired in about May 2017 to work first shift as a conveyor operator in the AR Department. (Tr. 8, 223) Woodward's position was not posted. (Tr. 87; R. Ex. 4) Kelly Withrow was hired in about June 2017 as a conveyor operator on first shift in the AR department. (Tr. 88, 223) Her position was not posted. (Tr. 88; R. Ex. 4) Respondent did not bargain with the Union regarding the changes in job bidding procedures. (Tr. 88) Although there were instances where new employees were hired into entry level jobs without the jobs being posted even prior to March 1, 2017, in several such cases the Union took action, including filing grievances, regarding the non-posting. (Tr. 76-78, 116, 271)

Another female employee on third shift was moved from a clipper position to a third shift coiler operator in the AR Department in about June/July 2017. (Tr. 119, 122) The job was not posted. (Tr. 119; R. Ex. 4) In about July 2017, another employee transferred from second shift clipping to day shift clipping in the AC department. (Tr. 119-120, 122). That job was not posted. (Tr. 120, R. Ex. 4) Finally, around May 2017, employee Kenny Grant was re-hired into a second shift LFK operator position/innerspring operator position in the AH department after some time off without having to bid on his job. (Tr. 134-137, 223, R. Ex. 4)

G. Respondent Directed an Employee to Meet with Another Employee to Sign a Petition to Decertify the Union

Human Resources Manager Stephen Day hired employee Cordell Roseberry on April 4, 2017. (Tr. 140, 142) On his second day of work, Roseberry talked to Day on work time and did so by the computers, outside the plant conference room, near where people clock in and out. (Tr. 142, 150, 151, 169) It was around mid-day. (Tr. 143, 162) After their conversation, Day pointed at Roseberry and made a motion for him to walk over to Keith Purvis. (Tr. 143-144, 163, 165) Roseberry only knew Purvis as the anti-union petition guy. (Tr. 142) Purvis asked Day if there were any more new hires. (Tr. 149) Roseberry walked over to Purvis. (Tr. 143) Purvis asked Roseberry if he had signed anything, any kind of petition. (Tr. 143, 145) Roseberry knew that Purvis was talking about the decertification petition. (Tr. 146) Roseberry said no, and Purvis told him to meet him at his truck after work. (Tr. 143) Contrary to any such assertion by Respondent, Purvis did not take Roseberry to his supervisor. (Tr. 143) Purvis's regular job did not entail taking employees to meet their supervisors. (Tr. 155, 164, 378) Purvis did not talk to Roseberry about anything work-related, only about signing the petition. (Tr. 145) At the time, Respondent, including Day, was aware that Keith Purvis had submitted a decertification petition. (Tr. 186)

III. CREDIBILITY RESOLUTIONS

The General Counsel's witnesses spoke credibly about the events at issue. In contrast, Respondent's witnesses offered contradictory testimony for its positions and they were often vague. In this regard, General Counsel witnesses Elmer Tolson, Marvin Berry, Cordell Roseberry, William Woodruff, Cecil Gross, and Paul Haddix were credible, truthful, consistent and straightforward.

With respect to witnesses who testified about the anti-union petition, several witness testified that they were the ones who put the same markings on the anti-union petition. For example, both George McIntosh and Kurt Bruckner testified that they were the individual who

put checkmarks on the anti-union petition. (Tr. 300, 303, 368) McIntosh further testified that he got employee Donnie Butler's signature (rather than just his printed name) before submitting the petition to Respondent, but Denisio claims that the signature was not on the petition at the time it was received, but that Butler signed it at a later date at the office. (Tr. 278-279, 368) McIntosh also stated that he could not identify Ricky Richardson and does not know what he looks like, but nevertheless claims to have collected Richardson's signature. (Tr. 370) Jonathan Bryant, who testified about gathering signatures for the anti-union petition, claimed to remember gathering the signatures, but could not recall what happened in a conversation he had on the day he testified. (Tr. 356-357, 359) Jacob Purvis, who attempted to authenticate many of the signatures on the anti-union petition, also admitted he had a bad memory. (Tr. 349) Thus, these witnesses' testimony about what happened months prior should not be credited.

Witness credibility resolutions with respect to the January 18, 2017 meeting are discussed in further detail, supra.

IV. LEGAL ANALYSIS

A. The Controlling Case Law Firmly Places the Burden of Proof on Respondent

1. The Well-Established *Levitz* standard for withdrawal of recognition

Section 8(a)(5) of the Act requires an employer to recognize and bargain with the labor organization chosen by a majority of its employees. In order to promote the Act's policies of industrial stability and employee free choice, the Board will presume that, once chosen, a union retains its majority status. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-85 (1996). Such a presumption "enable[s] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying about the immediate risk of decertification and by removing any temptation on the part of the employer to avoid good-faith bargaining in an effort to undermine union support." *Id.* at 576. The presumption of majority status is irrebuttable

during the term of a collective-bargaining agreement; upon expiration of the collective-bargaining agreement, the presumption continues but becomes rebuttable. *Id.* at 785-87.

When the presumption of a union's majority status is subject to challenge, an employer has a variety of options for testing the union's support. One such option - one that Respondent rejected - is to petition the Board to hold a secret-ballot election. It has long been the Board's view that "[s]ecret elections are generally the most satisfactory - indeed the preferred - method of ascertaining whether a union has majority support." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969). Thus, an employer that has reason to question whether a majority of employees support the union may initiate an election by filing a Representation Management ("RM") petition under Section 9(c)(1)(B) of the Act. If the union fails to garner a majority of votes in the ensuing RM election, the employer is relieved of its bargaining obligation.

An employer may also pursue other permissible, though less-favored, options for testing a union's majority status. Of relevance here is the option that Respondent chose, which allows an employer to unilaterally withdraw recognition of the Union and attempt to marshal facts regarding the union's lack of support as a defense to an unfair labor practice charge. An employer may overcome the presumption of majority status, and therefore lawfully withdraw recognition, only by showing that the union actually lacked majority support at the time recognition was withdrawn. *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 725 (2004). Notably, prior to the Board's decision in *Levitz,* an employer could lawfully withdraw recognition from a union after the expiration of a contract if it could demonstrate either (1) that the union did not in fact enjoy majority support, or (2) that the employer had a good-faith doubt as to the union's majority support. See, *Auciello Iron Works*, 517 U.S. at 786-87; *Levitz* specifically overruled this standard and Board law no longer permits an employer to withdraw recognition if it only has a good-faith doubt as to the union's majority support. Instead,

an employer's good-faith uncertainty entitles the employer to file an RM petition with the Board requesting an election to determine if there is continuing support for the incumbent union. *Levitz*, 333 NLRB at 717. Employees have a similar avenue for invoking the Board's election process to test a union's majority status. If 30 percent of the employees in the bargaining unit support a petition declaring that the union no longer enjoys their support, the Board will conduct a decertification ("RD") election under Section 9(c)(1)(A)(ii) of the Act.

An employer that decides to forego the Board's favored policy of an RM election "withdraws recognition at its peril." (Emphasis added) *Levitz*, 333 NLRB at 725. In *Levitz*, the Board observed: [I]f the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5). *Levitz*, 333 NLRB at 725. The Board emphasized that the evidence produced must be objective evidence – for example, a petition signed by a majority of the employees in the bargaining unit. *Id.*

Moreover, even where an employer produces objective evidence of a lack of majority support, that evidence might not remain conclusive. If, for example, the General Counsel comes forward with evidence rebutting the employer's evidence, "the burden remains on the employer to establish loss of majority support by a preponderance of all the evidence." *Id.*

The Board had an opportunity to revisit the standard in *HQM of Bayside, LLC*, 348 NLRB 758 (2006). There, the Board affirmed the principle in *Levitz* that the burden of proving actual loss of majority support rests squarely on Respondent. *Id.* at 759. In acknowledging that the employer in *HQM* received a decertification petition signed by an apparent majority of employees, the Board nevertheless found the withdrawal of recognition was

unlawful because twelve employees who previously signed the decertification petition signed a subsequent pro-union counter-petition, much like the case at hand. The Board reiterated that its "preferred method of testing employees' support for a union" is the filing of an RM petition. *Id.*, citing *Levitz*, supra, 333 NLRB at 727.

The first time the Board encountered a situation akin to the one here, where the Union did not notify Respondent of counter-evidence to the decertification petition was *Fremont-Rideout*, in which the Board adopted the ALJ's decision relying heavily on *Levitz*. *Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital*, 354 NLRB 453 (2009)(two-member Board decision), incorporated by reference in *Fremont-Rideout Health Group*, 359 NLRB 542 (2013). There, the ALJ concluded "the Union was under no obligation to notify the [employer], even if it had time and an opportunity, of its continued majority status by way of the reaffirmation cards it had obtained." *Id.* at 460. This interpretation is squarely in line with the Board's rationale in *Levitz* that an employer must prove actual loss of majority support at the time it withdraws recognition. If the burden is to truly rest with the employer, as the Board made clear, then the union has no burden to present counter-evidence to the employer. Indeed, the union in *Fremont-Rideout* was found to have "no burden nor was it obligated, in any way, to notify or advise the Hospital of the 18 cards in its possession" which nullified decertification signatures prior to the withdrawal of recognition. *Id.* at 459.

Taken together, the Board's decision in *Levitz*, *HQM*, and *Fremont-Rideout* have shaped the landscape in withdrawal of recognition cases. They serve to warn Respondent that it withdraws recognition at its peril and place a high burden on Respondent to show the Union suffered an <u>actual</u> loss of majority support at the time it withdrew recognition. Respondent is precluded from counting the signatures of employees who demonstrated support for the Union

after signing the decertification petition, even if it was unaware that the employees had repudiated their support for the anti-union petition.

2. Board Precedent Dictates Signatures on the Pro-Union Petition are Valid Demonstrations of Union Support

Signatures of employees who first signed a decertification petition and later signed their support for the union cannot be relied upon by an employer in withdrawing recognition. *HQM of Bayside, LLC*, 348 NLRB 758 (2006); *Port Printing Ad & Specialties*, 344 NLRB 354 (2005); *Parkwood Developmental Center*, 347 NLRB 974 (2006). All that is needed for an employee to nullify their initial decertification signature is for the employee to subsequently demonstrate support for the union. As the Board explained in *HQM*, "in attempting to show a loss of a union's majority support, an employer is not entitled to rely on signatures of employees who subsequently demonstrated support for the union." *HQM*, supra at 759.

Often, decertification signatures are nullified by revocation signatures. Such was the case in *Fremont-Rideout*, where employees signed cards which both explicitly revoked earlier signatures repudiating the union and affirmed their support for the union. *Fremont-Rideout*, supra at 456. A revocation card or petition makes the intent of the signatory employee crystal clear. If an employee affixes their signature to a revocation card or petition after first showing their dissatisfaction with the union, it follows that an employer may not rely on that employee's signature to show actual loss of the union's majority support. The Board has reasoned that revocation signatures render early disaffection signatures void. *Levitz*, 333 NLRB 717 (2001); *HQM*, supra; *Fremont-Rideout*, supra.

A revocation petition, however, is not the only manner in which employees may nullify anti-union signatures. Indeed, in *HQM* the Board was faced with a pro-union petition that did not include revocation language. The petition stated the undersigned "DO NOT wish to withdraw recognition and or representation from the [union]." *HQM*, supra at 758. The Board

found the petition was enough to void the signatures of employees who previously signed the decertification petition.

Employee signatures that nullified decertification signatures while not including explicit revocation language also arose in *Parkwood Developmental Center*. *Parkwood Developmental Center, Inc.*, 347 NLRB 974 (2006). There, some employees signed authorization cards after signing a decertification petition and prior to the employer's withdrawal of recognition. The Board reasoned "Although such evidence might have supported the filing of an RM election petition with the Board under the good-faith reasonable-uncertainty standard announced in *Levitz* for such petitions, it was not sufficient to support a withdrawal of recognition. *Id.* at 975, citing *Levitz*, 333 NLRB at 727-729.

Elsewhere, the Board has viewed the signing of a union authorization card in the absence of signing a revocation petition as a sufficient showing of support for the union to nullify a decertification signature. *Highlands Regional Medical Center*, 347 NLRB 1404, 1408 (2006). In *Highlands*, the Board viewed the authorization card as "unequivocal, post-petition demonstration of support for the union" which therefore "precludes counting [the authorization card signer] among the opponents of the Union in determining whether the Union had lost majority support when Respondent withdrew recognition. *Id.*

B. Sound Policy and Board Law Dictate the Union is Not Required to Notify Respondent of Counter-Evidence

As discussed above, the Board has made it clear that an employer always has the burden of proving an actual loss of majority support by a preponderance of all the evidence, including any rebuttal evidence. *Levitz*, 333 NLRB at 725, 725 n.49. See also, e.g., *Parkwood Developmental Center*, 347 NLRB 974, 974, 975 (2006), *enforced*, 521 F.3d 404 (D.C. Cir. 2008) (finding that employer failed to prove actual loss of majority support where union obtained

signatures and authorization cards from majority of employees); *HQM of Bayside, LLC*, 348 NLRB 787, 789-790 (2006), *enforced*, 518 F.3d 256 (4th Cir. 2008) (12 of the 35 signatures on a decertification petition were nullified by the same 12 employees who subsequently signed a pro-union petition; therefore, the employer was unable to rely on the original decertification petition as evidence of a union loss of majority support). The Board has further emphasized that the "preferred method of testing employees' support for unions" under *Levitz* is to file an RM petition with the Board, *HQM of Bayside, LLC*, 348 NLRB at 789, citing *Levitz*, 333 NLRB at 727, and that an employer, even with objective evidence that a union has lost majority support, "withdraws recognition at its peril." *Levitz*, 333 NLRB at 725.

It is also clear that, under current Board law, a union has no obligation to advise the employer that it possesses countervailing evidence of its majority status prior to the employer's withdrawal of recognition. *Fremont Medical Center & Rideout Memorial Hospital*, 354 NLRB 453, 459-60 (2009) *adopted by* 359 NLRB No. 51 (2013) (finding that the employer unlawfully withdrew recognition where union had not actually lost majority support on date employer withdrew recognition even though union had not informed employer, prior to withdrawal of recognition, of countervailing evidence of union support); *HQM of Bayside, LLC*, 348 NLRB at 788 (stating that union has no obligation to demonstrate conclusively to the employer prior to withdrawal of recognition that it still has majority status). This is so notwithstanding former Member Schaumber's footnote comments in the two-member Board decision in *Fremont Medical Center*, 354 NLRB at 453 n.3, musing whether the Board in a future case might, perhaps, consider whether it should impose a new affirmative obligation on unions to disclose evidence of majority support in *Levitz* cases. Counsel for the General Counsel notes that, even in raising this issue, former Member Schaumber expressly acknowledged that *Levitz* did not impose such an obligation, agreeing that Levitz "cannot fairly be read to create an affirmative obligation

on the part of a union confronted with a withdrawal of recognition to notify the employer that the union possesses evidence tending to negate the employer's evidence of loss of majority support." *Id.*

Significantly, no other Board member, and no current Board member, has ever suggested the imposition of such a new obligation -- and for very good reasons. Such an affirmative disclosure obligation would necessarily be based on a holding that, despite the employer's having refused to use the Board's "preferred method of testing employees' support" by filing an RM petition, and despite the employer's having instead acted unilaterally by withdrawing recognition "at its peril," an injustice would somehow be imposed on the employer by a showing at hearing that the union retained its employee support, and that any such injustice should outweigh the employees' demonstrated support for the union. Such a holding would be wholly contrary to the core tenets of *Levitz*, i.e., that "there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees, even on a good-faith belief that majority support has been lost," and that "employers must not be allowed to refuse to recognize unions that are, in fact, the choice of a majority of their employees." *Levitz*, 333 NLRB at 723. Thus, it is solely the employees' sentiment that is dispositive -- not the employer's belief, and not the union's conduct. Any policy concerns as to the timing of a union's production of rebuttal evidence of majority support are fully answered by *Levitz* itself, which made clear that an employer who wishes to avoid the peril of violating the Act by its withdrawal of recognition should use the Board's "preferred method" of filing an RM petition, so that the employees themselves can decide the issue. As the Board stated in *Levitz* "If employees' exercise of the right to choose union representation is to be meaningful, their choices must be respected by employers. That means that employers must not be allowed to refuse to recognize unions that are, in fact, the

choice of a majority of their employees." *Id*. For this reason, where an employer fails to prove, at hearing, by a preponderance of the evidence, that the union had in fact lost majority support at the time the employer withdrew recognition, the employer has not rebutted the continuing presumption of the union's majority status, and its withdrawal of recognition violates Section 8(a)(5) of the Act.

C. Respondent Did Not and Cannot Establish the Union Did Not Have Majority Support as of March 1, 2017

Respondent cannot show loss of actual majority support at the time of its withdrawal of recognition on March 1, 2017. Respondent announced its anticipatory withdrawal of recognition in its letters to the Union and employees on January 11, 2017 and January 12, 2017, respectively. The Union subsequently started its own counter-petition, and on February 21, 2017, it informed Respondent that it did not believe it lost a majority. Subsequently, but prior to Respondent's withdrawal of recognition, 15 employees who had signed the decertification petition left the bargaining unit. (Jt. Ex. 8) Thus, the Employer cannot rely on those 15 signatures. See, *Highlands Regional Medical Center*, supra. Moreover, 28 employees who initially signed the decertification petition subsequently signed the Union's petition of support, which clearly stated at the top: "We the undersigned members of the International Association of Machinists and Aerospace Workers, Local Lodge 619, support the Union at Leggett & Platt, Inc." Because the signatures on the pro-union petition post-date those on the anti-union petition (but pre-date Respondent's withdrawal of recognition), Respondent cannot rely on those 28 "crossover" signatures, which amount to unequivocal demonstrations of support for the Union. *See, HQM of Bayside, LLC*, *Highlands Regional Medical Center*, supra. Additionally, because William Woodruff never signed the anti-union petition, and since his name on the anti-union petition appears to have been forged, he also cannot be counted to show an actual loss of majority support. Also, because of contradictory evidence on how Donnie Butler's signature

came to be on the anti-union petition (McIntosh testified that he witnessed it and then gave the petition to Respondent, while Denisio claimed Butler's signature wasn't initially on the petition but he came to the office unprompted to sign it), combined with the fact that Respondent did not verify Butler's signature, Butler's name cannot be counted.

Subtracting the 15 employees who left the unit, the 28 who demonstrated support for the Union, William Woodruff, and Donnie Butler, the total anti-union signatures are 137, which is less than the 50% required to show an actual loss of majority support (50% of 295 is 148). At its own peril, Respondent failed to share its petition with the Union. After it received the Union's letter stating that the Union did not believe it lost majority support, Respondent could have avoided all doubt by requesting a Board-supervised election by petitioning for an RM election. Instead, at its peril, it unlawfully withdrew recognition. Respondent relied upon a petition with valid signatures from fewer than fifty percent of the bargaining unit when it withdrew recognition. Accordingly, Respondent's withdrawal of recognition of the union on March 1, 2017 was clearly unlawful.

D. Respondent's Defense that Employees were Coerced in Signing the Revocation is Entirely Without Evidence

1. Employee Testimony That They Were Misled Should Not Be Credited

The General Counsel anticipates that Respondent will argue that Tolsen threatened or misled employees into signing the pro-Union petition. This argument is not supported by record evidence or case law. Glen Dixon, for example, gave evasive and vague testimony about coming to the Union Hall to sign a petition. He acknowledged that he signed two documents on the day in question, and that one of them was a document for strike benefits. (Tr. 428-431) He first claimed that he doesn't sign his name with an *on* at the end, then later admitted that he does. (Tr. 429). He said he didn't know who was in front of him or behind him in line, but later, when it was convenient to him, claimed to remember it was Jesse Shepherd. (Tr. 442, 449)

Jack Keith claimed he put his signature on a list for strike benefits. (Tr. 409) However, he didn't recall who told him that. (Tr. 409) This is insufficient to attribute the statement to the Union. He also acknowledged his signature on the strike sanction vote document. (Tr. 417) Credible testimony from other witnesses about the event suggest that in his testimony, Keith was talking about the strike sanction vote document, not the pro-union petition. In any case, an employee who signs up for strike benefits during a strike is clearly in support of union representation as those benefits would not be available to non-represented employees.
Tina Freeman was also undoubtedly confused about which document she was testifying about signing when she said she didn't recall the header being on top of the pro-union petition given that she also signed a second sheet of paper without a header (i.e., the strike sanction vote). Marvin Rogers' testimony appears to be about an altogether different event at the Union Hall, as he describes being in a different room than all other employees, and states that a formal presentation was given, which all other witnesses deny. (Tr. 465-469)

Several of Respondent's witnesses, including Keith Purvis, Glenn Dixon, James Wells, James Green, Tim Keeton, Jack Keith, Marvin Rogers, Tina Freeman, Justin Gilvin, and Ashley Rogers, were represented by an attorney from the National Right to Work Legal Defense Foundation. Those employees have a clear bias in wanting the Union removed from the workplace; their testimony should not be credited to the extent it contradicts the testimony of the General Counsel's witnesses. Several of the employees also testified that they met with Respondent's attorneys prior to the trial; their coached testimony should not be credited.

Tolson and Berry, on the other hand, provided consistent, detailed testimony about how they collected revocation signatures and what was said to employees. This was not the first time the Union had faced potential decertification, so Tolson would have been aware of what was permissible. (Tr. 103) Tolson and Berry's version of events was corroborated by employees

Paul Haddix and Cecil Gross. Their testimony, including their denial of making misleading, threatening or coercive statements, should be credited.

2. The Statements Ascribed to Elmer Tolson do Not Amount to Unlawful Threats

None of the employees who testified at trial regarding the circumstances under which they signed the revocation petition provided sufficient testimony to support a finding that the Union threatened employees into doing so or misled them about the purpose. The testimony of the employees should not be credited for the reasons discussed above. However, even if the alleged statements they testified to are credited, they fail to amount to unlawful threats in violation of Section 8(b)(1)(A) of the Act or to objectionable conduct at a representation proceeding. [4]/ The alleged statement made by Tolson about a potential loss of job or benefits does not amount to an unlawful threat that might render the revocation of the signatures invalid.

Tolson's alleged statement (which he denies) lands under a long line of case law allowing unions to make predictions about potential job loss and changes to benefits. This is primarily because no union has the power to fire employees or to unilaterally alter benefits. *Rio de Oro Uranium Mines*, 120 NLRB 91, 94 (1958). Without the power to implement these changes, there can be no actual threat. The alleged statements at issue in *Rio de Oro* were made in the run-up to an election and involved threats to job security. The Board reasoned that the statements, "even if made by union agents, were such that they contained neither assertions which the employees could not evaluate nor threats within the Union's power to carry out." *Id.* The degree to which an employee can parse such a statement and the actual ability of the Union to carry out a threat are central tenets in determining whether or not the statement is lawful. Union predictions of job loss and loss or changes to benefits are allowed in an organizing context because such statements

[4]/ There are no allegations of conduct in violation of Section 8(b)(1)(A). The alleged statements at issue are most analogous to threats made by a union in a representation campaign setting and, therefore, will be analyzed as such.

"are readily evaluated by employees as being beyond the control of… the union." *Accord Accubilt. Inc.*, 340 NLRB 1337, 1338 (2003).

Hawkins testified that Tolson told him and other employees present on February 27, 2017 that if they let the Union go, their insurance would double and they would lose their jobs. (Tr. 584-585). Even assuming that Hawkins testified credibly, this statement does not amount to an unlawful threat. It is factually correct that an employer can change benefits at will without the presence of a union. It is demonstrably within the power of the employee to evaluate the Union's claim, and there is nothing in Hawkins's testimony to indicate he revoked his signature based on a threat by the Union. *Rio de Oro*, supra; *Accord Accubuilt, Inc.*, supra. The Board has consistently found "statements of this sort have been long held to be unobjectionable because employees are capable of evaluating them and they contain no threats within the power of the Union to carry out." *Allis-Chalmers Corp.*, 278 NLRB 561, 563 (1986) The same analysis applies to the handouts Tolson distributed on January 18, 2017- the statements in the handouts are readily evaluated by employees as beyond the Union's control and are therefore not threats. There is nothing in the record whatsoever to indicate that any employee read the handout that was given to them, or that they revoked their signature based on the handout. *Rio de Oro*, supra; *Accord Accubuilt, Inc.*, supra.

E. Having Unlawfully Withdrawn Recognition From the Union, Respondent Unlawfully Changed Employees' Terms and Conditions of Employment

1. The Changes Were Mandatory Subjects of Bargaining:

It is well settled that wages, hours, benefits and other terms and conditions of work are mandatory subjects of bargaining. *Fibreboard Paper Products Corp. v. NLRB*, 279 U.S. 203 (1965); *NLRB v. Katz*, 369 US 736 (1962). Unilateral actions by an employer that modify terms or conditions of employment constitute a per se violation of Section 8(a)(5). Such actions also allow for an inference of subjective bad faith. *NLRB v. Katz,* 369 U.S. 736 (1962). However,

only those changes that are "'material,' 'substantial,' and 'significant' violate the Act." *Peerless Food Products, Inc.,* 236 NLRB 161 (1978) (concluding that an employer's unilateral limitation on union representatives' formerly unlimited right of access did not violate the Act). *See also, Golden Stevedoring Co,* 335 NRLB 410, 415 (2001) (the Board found employer's unilateral change of its employee discipline system from oral reprimands to written warnings violated the Act); *Caterpillar, Inc.,* 355 NLRB No. 91 (2010) (an employer's unilateral change requiring that employees first use generic prescription drugs to receive reimbursement violated the Act).

Unilateral changes in wages, hours and other terms and conditions of employment after expiration of a collective bargaining agreement are unlawful because these conditions generally survive expiration of the agreement. *Hen House Market No. 3,* 175 NLRB 596 (1969), *enfid.* 428 F.2d 133 (8th Cir. 1970). Here, on March 1, 2017, after the expiration of the collective bargaining agreement, Respondent made changes to the following terms and conditions of employment: (1) wages, (2) paid personal time, (3) health insurance, (4) vacation, (5) stock bonus plan, (6) 401(k) plan, (7) dental insurance, (8) vision insurance, (9) flexible spending plan, (10) life insurance, (11) short term disability insurance, and (12), long term disability insurance. Respondent admits that the changes to these twelve terms and conditions of employment were material, substantial, and significant, and that they were made without bargaining with the Union. (Jt. Ex. 10) Hence, in making the changes, Respondent violated Section 8(a)(1) and (5) of the Act.

Respondent also made changes to its job bidding procedures. Job bidding procedures are mandatory subjects of bargaining, and changes in job bidding procedures amount to material, substantial, and significant changes. *Vincent Brass & Aluminum Co.*, 264 NLRB 334 (1982)(finding that unilaterally terminating the job-bidding procedure contained in the collective-bargaining agreement violated Section 8(a)(5) of the Act); *Ardsley Bus Corp., Inc.*,

357 NLRB 1009 (2011)(finding that excluding certain bus routes from the contractual seniority-bidding process amounted to a unilateral change in terms and conditions of employment, and violated Section 8(a)(5) of the Act). Here, as in *Vincent Brass & Aluminum Co.* and *Ardsley Bus Corp., Inc.*, Respondent ceased posting all jobs up for bid as required by the collective bargaining agreement and past practice. Sometime after March 1, 2017, George McIntosh, one of the signature gatherers of the anti-union petition, was moved to a new job doing electrical work without bidding for the job. Although Respondent claims this transfer is temporary, the record evidence establishes otherwise. The employee who vacated the job that created the work, Robert Ward, suffers from MS, a chronic and debilitating position. Denisio admitted that it hurts Ward to be doing his previous job on the floor and he asked to be considered for a job in the office. Moreover, Ward, who recently completed his accounting degree, was transferred to a branch accountant job. Based on the circumstances of the transfer, Respondent's claim that the transfer is temporary is dubious. In any case, Respondent has posted temporary bids when employees have left their positions due to health reasons in the past. (Tr. 183)

Respondent also did not post the job vacated by McIntosh. Instead, it simply appointed Jacob Purvis, a leader in the union decertification effort, to the position. Jacob Purvis agrees that he was supposed to have bid on the job because when Respondent eliminated his former position, he was supposed to be able to bump somewhere.

General Counsel's witnesses credibly testified that Respondent also did not post Ashley Rogers's job (assembly operator position in the AR department on third shift), Robert Woodward's job (conveyor operator in the AR department on third shift), Kelly Withrow's job (conveyor operator in the AR department on first shift), an unknown female employee's job (coiler operator in the AR Department on third shift), an unknown male employee's job (clipper in the AC department on first shift), or Kenny Grant's job (LFK/innerspring operator in the AH

department on second shift). Respondent did not sufficiently explain why these positions were not posted. Respondent did not bargain with the Union about the changes. Because there was no loss of majority union support on March 1, 2017, Respondent violated Section 8(a)(1) and (5) of the Act in unilaterally implementing all of the foregoing changes.

F. Respondent Unlawfully Directed Employees to Meet With A Fellow Employee to Sign a Petition to Decertify the Union

As a general rule, an employer may not solicit employees to revoke their authorization cards or otherwise solicit withdrawal from the Union. *See, e.g., Mohawk Industries Inc.*, 334 NLRB 1170 (2001). An employer may also not offer assistance to employees in revoking authorization cards in the context of other contemporaneous unfair labor practices. See *Id, citing Escada (USA), Inc.*, 304 NLRB 845, 849 (1991). In *North Hills Office Services*, 346 NLRB 1099, 1103 (2006), the Board found that the employer unlawfully assisted an employee in withdrawing union membership when an employer representative told her he was "going to get out of 32B-J [the Union] but that "if [she] had signed some papers it was going to be difficult to get [her] out of 32B-J." *Id.* In making the determination that the respondent's comments violated the Act, the Board noted that the comment was made in the context of other unfair labor practices, and that in that context, the respondent created a situation where the employee would tend to feel peril in refraining from revocation. *Id.*

Here, Day offered Purvis assistance in gathering signatures for his deauthorization petition by sending employees to speak with him regarding signing a decertification petition. This happened in the context of several ongoing unfair labor practices, including unlawful withdrawal of recognition and unilateral changes to employees' terms and conditions of employment. At the time Day sent Roseberry to speak with Purvis on April 5, 2017, Day knew that Purvis had submitted a decertification petition. Day did not explain to Roseberry why he should meet with Purvis. Taking employees to supervisors was not part of Purvis's job, and

indeed, it is undisputed that Purvis did not take Roseberry to his supervisor, or talk to him about anything work-related. Given these circumstances, Roseberry would reasonably construe Day's gesture to speak with Purvis – who he knew only as the anti-union petition guy – and subsequent solicitation to sign an anti-union petition, as an implicit request by Respondent to sign the deauthorization petition. Notably, Roseberry never asked for any information on how to go about signing an anti-union petition. There objectively did not appear to be any other purpose for the meeting with Purvis. Inasmuch as Day is the Human Resources Manager, Roseberry, who was a new employee, would not have felt free to disobey the instruction to meet with Purvis. Day's assistance to Keith Purvis went beyond the minimal ministerial aid allowed under the Act. See, e.g., *Corrections Corp. of America*, 347 NLRB 632, 633 (2006) (employer encouragement of decertification went beyond minimal support; credited testimony established that employer's communications about decertification were not prompted by employee inquiries and that the idea about decertifying was conceived by Employer and then proffered to employees).

G. The Board Should Require that Employers Utilize Board Representation Procedures to Fairly and Efficiently Determine Whether their Employees' Exclusive Bargaining Representative Has Lost Majority Support

In *Levitz Furniture Co. of the Pacific,* 333 NLRB 717, 725-26 (2001), the Board stated that it would revisit the framework it established for when employers may unilaterally withdraw recognition from their employees' exclusive bargaining representative if experience showed that it did not effectuate the purposes of the Act. Experience has shown that the *Levitz* framework has created peril for employers in determining whether there has been an actual loss of majority, has resulted in years of litigation over difficult evidentiary issues, and in a number of cases has delayed employees' ability to effectuate their choice as to representation.

Thus, the General Counsel urges the Board to hold that, absent an agreement between the parties, an employer may lawfully withdraw recognition from its employees' Section 9(a)

representative based only on the results of an RM or RD election. [5]/ Such a rule would benefit employers, employees, and unions alike by fairly and efficiently determining whether a majority representative has lost majority support. It will also better effectuate the Act's goals of protecting employee choice and fostering industrial stability, and is even more appropriate now because the Board's revised representation case rules have streamlined the election process.

1. The Board in *Levitz* sought to create a framework to encourage employer use of RM elections and left open future consideration of the General Counsel's proposal to require exclusive use of RM elections to resolve questions of majority support

In *Levitz,* the then-General Counsel proposed that employers should be prohibited from unilaterally withdrawing recognition. *Id.* at 719, 725. The Board acknowledged that its early case law supported the General Counsel's view. *Id.* at 721 & n.25. Specifically, it noted that in *United States Gypsum Co.,* 90 NLRB 964, 966 (1950), decided shortly after Congress amended the Act to provide for employer-filed petitions, the Board held that it was bad faith for an employer to unilaterally withdraw recognition rather than file a RM petition, which it described as "the method whereby an employer who, in good faith, doubts the continuing status of his employees' bargaining representative may resolve such doubt." *Levitz,* 333 NLRB at 721. The *Levitz* Board also acknowledged that the General Counsel's proposed rule might minimize litigation and be more protective of employee choice. *Id.* at 725. In this context, the Board noted that elections are the preferred means of testing employee support, and that the proposed rule would be more consistent with *Linden Lumber Division v. NLRB,* 419 U.S. 301, 309-10 (1974), which allows an employer to insist that a union claiming majority support prove it through an election. *Levitz,* 333 NLRB at 725.

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[5]/ The General Counsel does not seek any change to the holding in *Levitz* that employers can obtain RM elections by demonstrating a good-faith reasonable uncertainty as to a representative's continuing majority status. *Levitz,* 333 NLRB at 717.

However, the Board rejected the General Counsel's proposed rule and instead adopted a rule that it believed would effectively encourage employer use of RM petitions by elevating the evidentiary requirement for an employer's unilateral withdrawal, while lowering the standard for an employer's filing of an RM petition. *Id.* at 717. The Board then concluded that under its new framework, employers would be likely to unilaterally withdraw recognition only if the evidence before them "clearly indicate[d]" that a union had "lost majority support." *Id.* at 725. It stated that if future experience proved otherwise, it could revisit the issue. *Id.* at 726.

2. Experience under *Levitz* has failed to result in employers acting only where the evidence before them "clearly indicates" a loss of majority support and has caused protracted litigation undermining the core purposes of the Act

In the 15 years since *Levitz,* the option left available under the *Levitz* framework for employers to unilaterally withdraw recognition has proven problematic. In a number of cases involving unilateral withdrawal, employers have acted based on evidence that did not "clearly indicate[]" a loss of majority, causing protracted litigation over the reliability of that evidence. This unnecessary litigation has resulted in significant liability for employers and substantial interference with employee free choice. It also encourages the disclosure and litigation of individual employees' representational preferences, which can interfere with employees' Section 7 rights.

A fundamental flaw with the *Levitz* framework is that it fails to account for the difficulty of ascertaining whether evidence relied on by an employer actually indicates a loss of majority support, creating significant liability even for employers acting in good faith. For example, employers have unlawfully withdrawn recognition based on ambiguously worded disaffection petitions that did not clearly indicate that the signatory employees no longer desired union representation. *See, e.g., Anderson Lumber Co.,* 360 NLRB No. 67, slip op. at 1 n.l, 6-7 (2014) (written statements submitted by four employees that they did not want to be union members did

not show they no longer desired union representation), *enforced sub nom., Pacific Coast Supply, LLC v. NLRB,* 801 F.3d 321 (D.C. Cir. 2015). Employers have also unlawfully withdrawn recognition where they relied on untimely disaffection petitions. *Latino Express,* 360 NLRB 911,923-925 (2014) (rejecting petition signed by employees during the certification year, when the union has an irrebutable presumption of majority status). In other cases, employers mistakenly relied on disaffection petitions that were invalid because they contained signatures that employees had revoked. *See, e.g., Scoma's of Sausalito, LLC,* 362 NLRB No. 174, slip op. at 3 (Aug. 21, 2015) (employees revoked signatures on disaffection petition before employer withdrew recognition). Additionally, questions have arisen regarding unit composition, creating confusion as to how many, and which employees would actually constitute a majority. *See, e.g., Vanguard Fire & Security Systems,* 345 NLRB 1016, 1018 (2005) (finding employer unlawfully withdrew recognition where signatures on disaffection petition were of non-unit employees), *enforced,* 458 F.3d 952 (6th Cir. 2006). Moreover, employers have unlawfully withdrawn recognition based on facially valid disaffection petitions that did not actually constitute objective evidence of a loss of majority support because they were tainted by unfair labor practices. *See, e.g., Mesker Door, Inc.,* 357 NLRB 591, 596-98 (2011) (concluding that unlawful threats by employer's attorney and plant manager had a causal relationship with employees' disaffection petition and thus the employer's withdrawal of recognition based on it was unlawful).

Protracted litigation over these evidentiary issues also has interfered with the right of employees to choose a bargaining representative. It may take years of litigation before employees deprived of their chosen union obtain a Board order restoring the union's representational role, which completely undermines their Section 7 rights in the interim. *See, e.g., Id.* (ordering employer to bargain with union five years after employer's unlawful withdrawal of recognition). Because a restorative bargaining order that operates prospectively

fails to compensate employees for their lost representation, employees are irreparably deprived of what benefits their union could have obtained for them during the course of the employer's unlawful conduct. *See, Frankl v. HTH Corp.,* 650 F.3d 1334, 1363 (9th Cir. 2011) (affirming Section 10(j) bargaining order in part because the Board's inability to order retroactive relief for a failure to bargain, partly due to an unlawful withdrawal of recognition, means employees will never be compensated for "the loss of economic benefits that might have been obtained had the employer bargained in good faith").

At the same time, such litigation under *Levitz* can also delay the process for employees who want to reject representation. For example, an unfair labor practice charge filed by an incumbent union can create the "collateral effect of precluding employees from filing a decertification election petition with the Board." *Scoma's of Sausalito, LLC,* 362 NLRB No. 174, slip op at 1 n.2 (Member Johnson, concurring). *See, also Wurtland Nursing & Rehabilitation Center,* 351 NLRB 817, 820-21 (2007) (Member Walsh, dissenting) (noting that if the employer had not unlawfully withdrawn recognition, the Board could have held an RM or RD election to determine the unit employees' true sentiments).

Finally, evidentiary disputes about the reliability of employee petitions have resulted in the disclosure of individual employees' union sympathies and litigation of their subjective motivations for signing a petition. *See, e.g., Scoma's of Sausalito,* 362 NLRB No. 174, slip op. at 4-5 (reviewing multiple petitions and employee testimony to determine whether employees' representative had majority support at the time of the withdrawal of recognition); *Johnson Controls, Inc.,* Case 10-CA-151843, JD-14-16 (NLRB Div. of Judges Feb. 16, 2016) (same). Such open questioning of employees regarding their union support can chill the future exercise of Section 7 rights. *See, National Telephone Directory Corp.,* 319 NLRB 420, 421 (1995) (confidentiality interests of employees have long been a concern to the Board and "it is entirely

plausible that employees would be 'chilled' when asked to sign a union card if they knew the employer could see who signed") (internal citations omitted). The courts have also noted that such inquiries are unreliable because of the pressure that employers may exert over their employees to give favorable testimony. *See Pacific, Coast Supply,* 801 F.3d at 332 n.8; *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 608 (1969).

In short, the experience under *Levitz* has not yielded the results that the Board anticipated and intended. Consistent with the General Counsel's original recommendation in *Levitz,* the Board should hold that, absent an agreement between the parties, an employer may lawfully withdraw recognition from its employees' Section 9(a) representative based only on the results of an RM or RD election.

3. A rule precluding employers from withdrawing recognition absent the results of an RM or RD election will best effectuate the policies of the Act and better accomplish what the Board set out to do in *Levitz*

It is within the Board's expertise and discretion to determine how a withdrawal of recognition can be accomplished. *See, Linden Lumber,* 419 U.S at 309-10 (relying on Board's expertise in affirming rule that union must petition for an election after an employer has refused to recognize it based on a card majority); *Brooks v. NLRB,* 348 U.S. 96, 104 (1954) (noting that matters "appropriately determined" by the Board include when employers can ask for an election or the grounds upon which they can refuse to bargain). The Board should exercise its discretion and adopt the rule proposed above to best effectuate the policies of the Act.

The proposed rule is more consistent with the principle that "Board elections are the preferred means of testing employees' support." *Levitz,* 333 NLRB at 725. It is also more consistent with the Act's statutory framework and the Board's early interpretation of the Act's provision providing for employer-filed petitions. As the Board held in *United States Gypsum Co.* and referenced in *Levitz,* RM petitions are "the method" provided in the Act by which

employers may test a representative's majority support. *Levitz,* 333 NLRB. at 721. Moreover, the interests of both employers and employees would be best served by processing this issue through representation cases, which are resolved more quickly than unfair labor practice cases. [6]/ Indeed, the Board's new representation case rules, which have revised the Board's blocking charge procedures, have made elections an even more efficient manner of resolving representation questions. In light of these considerations, requiring an RM or RD election before a withdrawal of recognition will best serve the purposes of protecting employee free choice and industrial stability, which are the statutory policies the Board sought to protect in *Levitz.*

In the past, the Board's blocking charge procedure had been the major concern regarding the use of RM elections as a prerequisite for withdrawing recognition because of the potential delay in proceeding to an election. *See, e.g., Levitz,* 333 NLRB at 732 (Member Hurtgen, concurring) ("Faced with an RM petition, unions can file charges to forestall or delay the election."); *B.A. Mullican Lumber & Mfg. Co.,* 350 NLRB 493, 495 (2007) (Chairman Battista, concurring) (stating that "an RM petition leading to an election is superior to an employer's unilateral withdrawal of recognition," but expressing concern about the potential delay caused by union-filed blocking charges), *enforcement denied,* 535 F.3d 271 (4th Cir. 2008). However, the Board's new election rules should allay this concern. For instance, the rules impose heightened evidentiary requirements; a party must now affirmatively request that its charge block an election petition, file a written offer of proof in support of its charge, include the names and anticipated testimony of its witnesses, and promptly make its witnesses available. *See,* NLRB Rules and Regulations Sec. 103.20 (effective April14, 2015). If the Region determines that the proffered

[6]/ In FY 2015, 87.1% of representation cases were resolved within 100 days while 80.4% of unfair labor practices were resolved within 365 days. *See* National Labor Relations Board Performance and Accountability Report (2015) at 25-26.

evidence is insufficient to establish conduct interfering with employee free choice, it will continue to process the petition and conduct the election. *Id.*

Indeed, initial data shows that this change has significantly reduced the number of blocking charges. Between April 2014 and April 2015, in the year before the new election rules went into effect, unfair labor practice charges blocked 194 of 2,792 election petitions. [7]/ Between April 2015 and April 2016, in the year after the new election rules went into effect, charges blocked only 107 of 2,674 petitions, a decrease of just over 40%. [8]/ This data shows that the more efficient election procedures have largely resolved prior concerns regarding blocking charges.

Beyond the foregoing substantive and procedural reasons justifying the proposed rule, its adoption will not interfere with other methods of dissolving an existing bargaining relationship that do not involve unilateral action by an employer. Employees will still be able to exercise their choice to not be represented by their current union by filing an RD petition, and they will be able to do so without the threat of an employer's unlawful withdrawal blocking an RD election. In addition, the proposed rule will permit a voluntary agreement between the employees' bargaining representative and their employer for withdrawal, whether this involves a union's disclaimer of interest or a private agreement between the parties to resolve the question. Finally, if a bargaining representative, through its own egregious unfair labor practices creates an atmosphere of employee coercion that renders a fair RM election improbable, the Board could

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[7]/ *See,* NLRB News & Outreach, Fact Sheets, Annual Review of Revised R-Case Rules (Apr. 20, 2016), https :/ /www .nlrb.gov /sites/default/files/attachments/news-story/node-4680/R-Case%20Annual%20Review.pdf.

[8]/ *Id.* In addition, since the implementation of the Board's new election rules, RM petitions have increased from 49 in each of FY 2013 and FY 2014 to 61 in FY 2015, demonstrating increased employer confidence in the RM process. *See Employer-Filed Petitions-RM,* NLRB, https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/employer-filedpetitions-rm (last visited May 3, 2016).

permit a unilateral withdrawal if an employer provided objective evidence of an actual loss of majority support. [9]/

For the above reasons, the Board should exercise its discretion to modify its standard to hold that, absent an agreement between the parties, an employer may lawfully withdraw recognition from its employees' Section 9(a) representative based only on the results of an RM or RD election.

V. REMEDIES

As part of the remedy for the unfair labor practices alleged in the complaint, Counsel for the General Counsel seeks an Order requiring that a meeting or meetings be scheduled to ensure the widest possible attendance, and that Respondent's representative, Chuck Denisio, read the notice to the employees on work time in the presence of a Board agent and a Union representative at that meeting. Alternatively, the General Counsel seeks an order requiring that Respondent promptly have a Board agent read the notice to employees during work time in the presence of Chuck Denisio and a Union representative.

This remedy is necessary based on Respondent's unlawful conduct of withdrawing recognition of the Union as the collective bargaining representative of Respondent's employees, its unlawful unilateral changes to thirteen different terms and conditions of employment, including wages, vacation, and insurance, and its unlawful direction to an employee to have him meet with another employee for the purpose of signing an anti-Union petition. The remedy is necessary because the unfair labor practices were committed by high ranking officials in the facility and because the impact and awareness of the unfair labor practices is unit wide. See *OS*

[9]/ *Cf. Union Nacional de Trabajadores (Carborundum Co.),* 219 NLRB 862, 863-64 (1975) (revoking union's certification based on its violent and threatening conduct and extensive record of similar aggravated misconduct in other recent cases), *enforced on other grounds,* 540 F .2d 1, 12-13 (1st Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977); *Laura Modes Co.,* 144 NLRB 1592, 1596 (1963) (refusing to grant union bargaining order remedy based on card majority where union created atmosphere of coercion based on its agents physically assaulting employer officials who displayed unwillingness to recognize their employees' rights under the Act).

Transport LLC, 358 NLRB 117 (2012) (relying on senior officials involvement in the commission of unfair labor practices to require a notice reading, and relying on awareness of unfair labor practices within the unit to require a notice reading). The information that Respondent has withdrawn recognition from the Union and changed employees' terms and conditions of employment has undoubtedly proliferated unit-wide as employees were notified of the changes in Respondent's January 12, 2017 and March 2, 2017 letters. These unfair labor practices were directed to the entire workforce, and they have not been remedied. The Board has granted notice readings in similar cases in the past. See *Vincent/Metro Trucking, LLC and United Food and Commercial Workers Local 789,* 355 NLRB 289 (2010)(finding that a notice reading was necessary to remedy Respondent's unfair labor practices of soliciting employees to decertify the Union, preparing, distributing, and collecting affidavits in support of decertification, and unlawfully withdrawing recognition from the Union, because the unfair labor practices were both serious in nature and affected the entire bargaining unit). In addition to the above, the General Counsel further seeks all other relief, including the provision of an affirmative bargaining order as may be appropriate to remedy the unfair labor practices alleged.

VI. CONCLUSION

Based on the record as a whole, and for the reasons discussed above, Counsel for the General Counsel respectfully requests that the Administrative Law Judge find that Respondent violated Sections 8(a)(1) and (5) of the Act as alleged in the complaint. The recommended conclusions of law are set forth below:

1. Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from and refusing to bargain with the Union on March 1, 2017 and continuing to date, as the exclusive collective-bargaining representative of the contractual bargaining unit.

2. Respondent violated Section 8(a)(1) of the Act by directing its employee to meet with a fellow employee to sign a petition to decertify or repudiate the Union in about early April 2017.
3. Respondent violated Section 8(a)(1) and (5) of the Act by making the following changes to bargaining unit employees' terms and conditions of employment effective March 1, 2017, without affording the Union an opportunity to bargain:

    (1) wages

    (2) paid personal time

    (3) health insurance

    (4) vacation

    (5) stock bonus plan

    (6) 401(k) plan

    (7) dental insurance

    (8) vision insurance

    (9) flexible spending plan

    (10) life insurance

    (11) short term disability insurance

    (12), long term disability insurance

    (13) job bid procedures

Attached hereto as Attachments A and B, respectively, are a proposed order and a proposed Notice to Employees for your consideration.

Dated at Cincinnati, Ohio this 8th day of September 2017.

Respectfully submitted,

Zuzana Murarova
Counsel for the Acting General Counsel
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Attachment: Attachments A & B

Attachment A

Respondent, Leggett & Platt, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from

   (a) Withdrawing recognition from the International Association of Machinists and Aerospace Workers (IAM) District Lodge No. 619, AFL-CIO (Union), and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of unit employees.
   (b) Undermining the Union and interfering with employee free choice by directing employees to meet with another employee for the purpose of obtaining employees signatures on a petition to decertify or repudiate the Union.
   (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

   (a) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

   > The Company's production and maintenance employees at the Company's New Street and Ecton Road, Winchester, Kentucky plants, including inspectors and shipping and receiving employees. Excluded from recognition under this Agreement are the Company's over-the-road drivers, office clerical employees, quality auditors, inventory control employees, parts room attendants, guards, professional employees, and supervisors as defined in the Act.

   (b) On request of the Union, adhere to the terms and conditions set out in the expired collective-bargaining agreement honored through February 28, 2017, giving effect to its terms retroactive to March 1, 2017, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union.

   (c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's repudiation of the collective-bargaining relationship.

   (d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters.

   (e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records,

timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days of service by the Region, post at its Winchester, Kentucky facilities copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director of Region 9, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2017.

(g) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by the Respondent's General Manager Charles Denisio or, at the Respondent's option, by a Board agent in Denisio's presence.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Attachment B

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

International Association of Machinists and Aerospace Workers (IAM) District Lodge No. 619, AFL-CIO, the Union, is the employees' representative in dealing with us regarding wages, hours and other working conditions of our employees in the unit described below:

> The Company's production and maintenance employees at the Company's New Street and Ecton Road, Winchester, Kentucky plants, including inspectors and shipping and receiving employees. Excluded from recognition under this Agreement are the Company's over-the-road drivers, office clerical employees, quality auditors, inventory control employees, parts room attendants, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT withdraw recognition from the Union or refuse to recognize and bargain with the Union as your bargaining representative in the absence of a Board election or absent proof of an actual loss of majority support of the bargaining unit employees at the time recognition is withdrawn.

WE WILL NOT make changes in wages, hours and working conditions without reaching an overall good faith impasse.

WE WILL NOT tell you to meet with other employees to sign a petition to decertify the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL recognize and bargain with the Union as your representative concerning wages, hours and working conditions. If an agreement is reached with the Union, we will sign a document containing that agreement.

WE WILL, if requested by the Union, rescind any or all changes to your terms and conditions of employment that we made without bargaining with the Union.

WE WILL pay you for the wages and other benefits lost because of the changes to terms and conditions of employment that we made without bargaining with the Union.

LEGGETT & PLATT, INC.
(Respondent)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

550 MAIN ST
RM 3003
CINCINNATI, OH 45202-3271

Telephone: (513) 684-3686

CERTIFICATE OF SERVICE

September 8, 2017

I hereby certify that I served the attached Counsel for the General Counsel's Brief to the Administrative Law Judge on all parties by mailing true copies thereof by electronic mail today to the following at the addresses listed below:

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